No. 12437

United States

Court of Appeals

For the Ninth Circuit

JAMES ANTHONY ALLEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANT

Upon Appeal from the United States District Court,
Eastern District of Washington,
Northern Division.

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Under the subject "Pleas" page 2, Brief of Appellee, it would seem that counsel for appellee are putting forth an effort to lead this Court to infer from the proceedings had on March 21, 1949, that the reason Allen withdrew his plea of *nolo contendere* and entered a plea of not guilty to all counts of the indictment was the statement of Judge Driver to the effect that a penitentiary sentence could be imposed. The advancement of this contention loses sight of matters which in part appear of record, but are not made clear to this Court as they were to Judge Driver at the time Mr. Emigh addressed the Court as to the rule that the Court would apply in relation to the imposition of sentence under a plea of *nolo contendere,* that is, whether the Court would follow the common law rule and

treat the case as being a violation of regulatory statutes or the rule prevailing in the Ninth Circuit that any sentence which might be passed upon defendant under a plea of guilty might be imposed.

The Court had previously stated that it had the benefit of a pre-sentence investigation report prepared by the probation officer as to each of the three defendants (R. 59). However, an examination of the Record relating to the withdrawal of Allen's plea of not guilty and substitution of the plea of *nolo contendere* discloses that Allen's side of the facts of the case had not been presented to the Court as had been done in relation to the defendants Grismer and Keane (R. 27-68). But it does appear from the Record that Allen was motivated in withdrawing his plea of *nolo contendere* by matters not appearing in the Record. It will be noted that on page 56 of the Record, Judge Driver on January 13, 1949, before accepting Allen's plea of *nolo contendere* made the following statement:

> "I think the record may show that a conference has been held in chambers regarding this matter prior to this session, in which counsel for the defendant and the United States Attorney were present, so it isn't necessary for you to repeat here in detail, Mr. Etter, your reasons for submitting this plea."

It is further noted that at page 62 of the Record, Judge Driver in commenting upon defendant Allen's application for leave to enter a plea of *nolo contendere*, said:

> "defendant Allen came in by counsel, and *I*

thought made the logical contention that he shouldn't be by implication singled out as the one villain of the piece here, and that if the others were permitted to enter a plea of *nolo contendere* he should do so also, and I think there was a suggestion made at that time that he would like at that time, or wished to have a conference in which he'd present his side of it, and have the defendant Keane present his case to the probation officer, and thrash the whole thing out, and that seemed to be acceptable at that time. On further thought it seemed to me that was not the proper way to proceed here, that we shouldn't have an informal hearing of the matter before the probation officer; I could see where there might be difficulties and that that wasn't desirable, and we decided that that should not be done." (R. 62.)

Keane had been permitted to, and had by counsel set forth a long dissertation upon his profession, his inebriacy, and all other excuses which his capable attorneys could bring before the Court and very much therein begged leniency on the grounds that he was a dupe, an incompetent, and a victim of others, and because of his physical and mental condition he could not entertain the necessary intent, which is the gist of the offense charged (R. 27-48). Grismer, appearing by his attorney, also advanced reasons why he did not entertain the necessary intent so that leniency be granted to him (R. 49-54).

When defendant Allen applied to withdraw his plea of not guilty and substitute a plea of *nolo contendere,* there was an understanding that he should be permitted to present the facts which he relied upon to prove that there was not any criminal intent or conspiracy

on his part, and at that time government counsel stated to the court that if Allen would withdraw his plea of not guilty and enter a plea of *nolo contendere* to the first six counts of the indictment, the government would move to dismiss the seventh count, which is the conspiracy count (R. 55). It appears that the Court, at the request of the District Attorney, after accepting this offer on Allen's part to fully present his side of the facts, canceled the proposed conference because "the court could see where there might be difficulties and that wasn't desired," and this was not made known to Allen or his counsel until the time set for hearing on the *nolo contendere* pleas of all three defendants. This is wholly without reflection upon Judge Driver as he fully made his position clear a short time later (R. 63).

However, it is clear that, when Allen withdrew his plea of not guilty and tendered a plea of *nolo contendere,* he felt that under all of the circumstances he would have an opportunity to fully present his position in relation to the charges made against him, much as the other defendants had done. It is equally true that when he withdrew his plea of *nolo contendere* such opportunity had not been afforded him. We think it may be fairly inferred from the Record that Allen considered when withdrawing his plea of not guilty he would have a fair opportunity before the Court passed judgment to present fully, through the probation officer, to the Court the facts which he relied upon as a defense, and the fact that he had never been charged criminally before in any action, and that he

might fairly anticipate that he would not be singled out as a scapegoat to bear punishment for the crimes of Keane. The only way defendant Allen could bring before the Court the facts of the case and not be presented in the light of a villain practicing his villainies upon an incompetent, innocent attorney and an unfortunate prospector was to stand trial on the indictment, and it may be well noted from the facts before the Court, and we will repeat that counsel for the government was ready to dismiss as to Allen the only count upon which he was convicted, viz, the conspiracy count (R. 55).

Answering what is entitled as the Conspiracy Count on pages 3 and 4 of Appellee's Brief there is recited both the essential and non-essential elements of the conspiracy count and then it is stated that the sales of stock of Extension and Pilot were made to the public on the representation that the proceeds would be used for development of the mining properties owned by them and the conclusion is drawn without reference to the Record:

1. That Allen and Keane were promoters of these companies, whereas the government itself proved by its witness attorney Johnston, who prepared the prospectuses of these two companies that Allen was not a promoter of either of these companies according to information furnished him by Keane and Grismer, the latter advising the SEC that Allen was not a promoter and the statements in the prospectuses are at-

torney Johnston's conclusions from all the facts he could gather (Appellant's Brief, pages 23-24). In fact, John Sekulic, president of Big Friday, of which Keane, Horning and Judge Featherstone were also directors, was the promoter with Keane of Extension (Grismer, 384-387, 443, 464-466, 469, 480-481; Horning, 263, 275; Emacio, 994; Keane, 709, 712-713; Vermillion, 230). While Sekulic was under subpoena by the government, for some unexplained reason he was not called as a witness by it.

Allen's contention was that he was in no manner responsible for any statements made in the prospectuses of Extension and Pilot, and there is no evidence that Allen had anything to do with any financial arrangements concerning underwriting agreements (Morphew, bookkeeper for Edwin LaVigne & Co., 527; Nolting, for E. J. Gibson Co., 509; O'Brien, for Pennaluna & Co., 536; Redfield, 530).

2. That Allen and Keane embezzled and diverted a large portion of such proceeds to their own use and benefit, whereas Keane as attorney for Extension, as president of Pilot with his stenographer as vice president, and as president of Montana Leasing Company, handling all funds and issuing all checks, embezzled the funds of Extension and Pilot, and for the embezzlement of Extension funds Grismer as president endeavored to have the State court of Idaho prosecute him for such crime (Brief of Appellant, pages 5, 6 and 40). See also Randall's audit of Extension and Pilot (Deft's Exs. T and U, Appellant's Brief, page 7).

3. It is further stated that after these diversions, Allen and Keane unloaded large quantities of stock on the investing public, whereas not a single investor was called as a witness against Allen and in fact Allen's sales of Extension and Pilot stock, acquired from Grismer, were made more than a year after the original issues of stock of these two companies to the public and on an unsolicited broker's bid for the broker's own personal account (Brief of Appellant, pages 20-22).

Government counsel discuss on page 5, Appellee's Brief, diversions from Extension funds. The statement therein contained that Montana Leasing and its successor, Lexington Silver-Lead, were wholly owned and controlled by defendants Allen and Keane is misleading and erroneous. Allen's interest in these companies was because of the Delaware investment, the Lexington Mining Company investment owning Lexington Mine, and his personal investment. Allen had charge of the mining operations of Montana Leasing only. Prior to December 26, 1946, when Allen became president of Lexington Silver-Lead, Keane handled all legal work and financial transactions (1109-1110, 1022, 1029, 1056, 1057, 1059, 1064, 1108, 1113).

If the Court will analyze Plaintiff's Exhibit 120 of checks of Montana Leasing and Lexington Silver-Lead signed by Allen from July 2, 1945, to August 31, 1946, it will find that, out of 260 checks totaling $49,-327.91 (Appellee's Brief, page 13), approximately $6,300 was properly chargeable to Allen's personal account, nearly $20,000 was chargeable to mining ex-

pense, and about $4,600 was chargeable to travel expense. Allen put more money into Montana Leasing and Lexington Silver-Lead than he received from sale of stock or what he had drawn out chargeable against his personal account by about $80,000 (R. 1167).

As to diversion of Pilot funds, government witness Vermillion, who had worked for Keane for five years (R. 226) stated emphatically that Allen had nothing to do with the financial transactions of Pilot (R. 225). Porter, who testified Keane had been his attorney since 1936 and who was hired by him to organize War Eagle Mining Company (998-999), stated that in negotiating a loan from Keane he never discussed the matter with Allen, Allen had nothing to do with his securing the loan, and that neither Keane nor Allen had or now have any interest in War Eagle (1002-1003), contradicting Keane's testimony that Allen, Keane and Porter each owned a one-third interest in War Eagle (Brief of Appellee, page 15, and Keane's testimony at R. 655). Vermillion's testimony that War Eagle checks of $1200 on Pilot funds were prepared by her pursuant to Allen's instructions is in direct contradiction of her testimony that Allen had nothing to do with the Pilot financial transactions, and contradicted by Porter (R. 998-999).

The statement on page 7 of Appellee's Brief that Independence advanced large sums of money for joint enterprises of Keane and Allen is misleading and erroneous for the reason that checks of Independence

to Allen to June, 1943, were loans to Lexington Mining Company secured by mortgage and for Lexington payrolls, repaid to Keane personally, as he requested, for Independence (Pltf's Ex. 125) and total checks paid back to Keane, president of Independence at that time, amounted to $29,408.88, was not controverted.

The testimony shows, and it has not been controverted, that when Keane settled the Independence-Marquardt-Kingsbury lawsuit in June and July, 1946, with attorneys Horning, Hull, Langroise and Keane's law partner McCann, there was about $40,000 drawn out of Pilot, as the audit shows (R. 1147-1148).

The Court's attention is called to the fact that the government deliberately failed to show a schedule of the withdrawals from Montana Leasing and Lexington Silver-Lead accounts made by Keane to other companies or individuals or to himself personally.

Referring to the statement in Appellee's Brief, page 8, on diversion of $10,000 of Extension funds to Delaware, that Allen had French fill in the Extension checks Nos. 8 and 9 (Pltf's Exs. 6a and 6b) is false and erroneous. French testified she had no independent recollection of Allen being in her office August 7, 1945 (R. 338, Pltf's Ex. 34). Government counsel have gone outside the Record and attempted to inject into it evidence that is not there. French did not testify that Allen had her deposit the $10,000 Extension check to Delaware account, nor did she testify that she filled in the $5000 Extension check (6b) or paid Callahan

Consolidated $6000 or paid Walter Hanson $1000 at Allen's direction as stated on pages 9 and 11 of Appellee's Brief, and the statement on page 12 of Appellee's Brief that the August 28, 1945, check for $5000 was prepared by Allen is absolutely false and has no foundation in fact.

The government deliberately did not produce Donald A. Callahan, president of Callahan Consolidated Mines, or Walter Hanson, Wallace attorney, even though both were available, and, further, it will be noted that Vermillion did not produce her notes wherein she claimed her memo was made on August 7, the date Keane supposedly was near Avery on a fishing trip with John Sekulic, which is about an hour's drive out of Wallace, and there is no evidence that he remained at this spot all day on August 7 with the same Sekulic mentioned in *Independence Lead Mines vs. Kingsbury,* 9th Cir. 175F. 2d 983.

It will be noted that Vermillion kept blank Delaware checks signed by Allen in their safe (R. 224). McLean testified that Delaware blank checks signed by Keane were left with her, and that she had done work for Keane (R. 329).

A further hypothesis as to the innocence of Allen can be given to the above transactions when considering Vermillion's testimony, and that if she were such a loyal servant to Allen, why didn't he have her complete these alleged transactions? She and Keane had

written every other check for withdrawal from the Extension and Pilot bank accounts.

Allen's testimony is to the effect that his only requests to Vermillion were with reference to stock certificates from the Grismer stock after he had acquired it from Grismer, and that was in September or October of 1945 (Vermillion R. 1090, Pltf's Ex. 67, 67a). And when Allen did ask her to see financial records of the Lexington Company she stated "my instructions are to give you nothing" and that her instructions would come from Keane first and that she would have to carry out Mr. Keane's instructions (Allen R. 1063).

Allen further denies ever seeing any financial statement or checks concerning Lucky Friday Extension until about January 15, 1949, and that was in the District Attorney's office (Allen R. 1060).

Each one of the six substantive counts of the indictment charged Allen with diverting the funds of Extension and Pilot and on each of these six counts he was acquitted.

So far as Vermillion's testimony with respect to these checks is concerned, she was under Keane's domination and her credibility for truth and veracity was definitely impeached by a report to the Department of Licenses of the State of Washington, sworn to by her on May 1, 1946, that Extension for the year ending December 31, 1945, had $51,077.92 cash on hand (Deft's Ex. a), whereas Extension bank statement showed a balance on (Saturday) December 29, 1945, of $9,333.92

and on January 3, 1946, $7,047.92 (Deft's Ex. B, R. 245-246). She was in a position with Keane where she could not have honestly made such a mistake and she testified that she herself obtained the December, 1945, statement from the bank (R. 254).

French's testimony disproves Vermillion's testimony that Allen was standing by French when the Extension checks were handed him (R. 167).

At this point we call the Court's attention to the fact that Appellee's Brief is wholly devoid of any reference to Keane's excuses for his conversions covered by pages 8 to 12, inclusive, of Appellant's Brief, nor to his forging of Allen's name to the $60,000 production note of Montana Leasing to Independence (Deft's Ex. M) and the J. A. Hogle Co. check of $6,872.95 payable to Allen (Pltf's Ex. 105, R. 1077, 1091-1093, 1164-1165).

On the subject of the diversion of $15,000 of Pilot funds to Coeur d'Alene Consolidated: government counsel base their whole argument in an effort to connect Allen with this transaction on an erroneous statement of facts. The $40,000 check of E. J. Gibson & Co. payable to Pilot, covering proceeds from sale of Pilot stock (Overt act 8 of Seventh Count of Indictment) is stated to be dated May 23, 1946, as Ex. 31-A. As a matter of fact it was on this date that Keane made Allen and Grismer president and secretary-treasurer, respectively, of Coeur d'Alene Consolidated, and naturally it would be to the advantage of the prosecution

to have this check dated as of May 23, 1946, and thus delivered to Allen as of that date as president of Coeur d'Alene Consolidated. But such are not the facts.

This check is Pltf's Ex. No. 13 and is dated May 20, 1946. To and including May 22, 1946, Keane was president of both Pilot and Coeur d'Alene Consolidated, then why would the check be delivered to Allen? Allen testified he never saw this $40,000 check until it was in the district attorney's office and that he did not deliver it to Keane (1088-1089). The attempt to connect Allen with this transaction is disproved by what actually occurred when this check was delivered to Keane.

Pltf's Ex. 37 is a bank deposit slip dated May 22, 1946, crediting Pilot account with the following:

	$40,000
F. C. Keane ----------	20,000
	$20,000

Pltf's Ex. 36 is a bank deposit slip dated May 22, 1946, crediting F. C. Keane's account with the following:

	$10,000
	5,000
	$ 5,000

Pltf's Ex. 38 is a bank deposit slip dated May 22,

1946, crediting Coeur d'Alene Consolidated's account with

$25,000

with notation: Wallace, Idaho—No withdrawal subject to escrow agreement between this Co. and C.d'A. Mines.

Keane made these deposits in the bank (R. 626). Pltf's Ex. 31 is a $10,000 check of E. J. Gibson Co. dated May 21, 1946, to attorney Gyde and Pltf's Ex. 31-a is a $4500 check of E. J. Gibson Co. dated May 23, 1946, to Gyde. Keane took these two checks to Gyde's office; Gyde endorsed them and at Keane's request gave them to Keane (R. 281-283). Pltf's Ex. 36 represents the deposit to Keane's personal account of $5,000 of the $10,000 check.

For further facts on this score see Appellant's Brief, pages 22, 23, and 29.

The diversion of Pilot funds to War Eagle and of Pilot money to Independence has been heretofore mentioned in this brief and in Appellant's Brief as to Independence advances at page 17.

As to sale of Extension and Pilot promotion stock: In a further effort to connect Allen with Extension attorney fees' stock, government counsel indulge in a further erroneous statement of facts as to what Johnston testified. The substance of Johnston's testimony is clearly and briefly given in Appellant's Brief, pages 28-29, and we call attention to another mistake at top of page 17 of Appellee's Brief as to the amount of stock returned by Johnston to Keane.

On page 17 of Appellee's Brief, it is stated that 60,000 shares of the 425,000 shares of promotion stock were sold in the names of J. A. Allen and Helen Jorgenson for $13,410.20 (Ex. 114) and that this money went to Allen. This is not true because it has already been shown that 35,000 shares of this stock were sold by Keane who forged Allen's name to the check for $6,872.95 of J. A. Hogle & Company.

The stock transactions referred to on pages 17 to 19 of Appellee's Brief are fully covered in Appellant's Brief on pages 20 and 21, and in Allen's testimony (R. 1137-1140).

The financing of Montana Leasing and Lexington Silver-Lead by Independence, as discussed in Appellee's Brief, page 19, under the heading "Background of Allen's Part in the Promotion of Extension and Pilot" is fully discussed in Appellant's Brief commencing with page 14 under the heading "Record Evidence Disproved Keane's Testimony as to Financial Condition of Montana Leasing in Spring of 1945" and these facts prove the falsity of Keane's claim that it was because of the financial difficulties of Montana Leasing that he and Allen were to promote the Extension for the purpose of *bailing out in Montana.*

It was not because of a civil injunction against Allen that Grismer was made to appear as a principal promoter of Extension because the citation to the Rec-

ord, pages 612 and 614, does not bear out such a statement. As to the statement that Allen advised Keane that he had acquired Extension ground from John Sekulic, it will be noted that the government failed to produce John Sekulic, president of Big Friday, and it will be further noted from the Record that John Sekulic, Horning, Keane and Judge Featherstone, all directors of Big Friday, were the actual promoters of Extension for which they received very substantial blocks of stock of Extension, and because of the financial assistance given to Big Friday by Extension, that Sekulic, Judge Featherstone and Horning each made over $50,000. By the testimony of Grismer and Vermillion it is shown that Judge Featherstone and Horning shared in Sekulic's Extension stock (469, 481, 230) and that the contract between Big Friday and Extension enhanced the value of Big Friday's stock so that it increased from 20 cents per share to $1.75 per share, and 150,000 shares of Big Friday stock, of which 50,000 shares each were owned by Judge Featherstone, Horning and Sekulic, were sold at a price of a little over one dollar per share (Keane, 716-718; Powers, R. 1015-16-17, and Deft's Ex. V).

The true facts, and it is borne out by the Record, are that the Big Friday was in financial difficulty and unable to proceed further with the development of its mine. It was indebted to its president John Sekulic in the sum of $10,000 (Emacio, R. 993, 994, 996), and it was Horning, Keane and Featherstone that formed the

Extension Company for the development of Lucky Friday and Extension ground, and not as Keane stated to "bail out in Montana."

The Record conclusively shows further that Keane, in September and October of 1945, during the negotiations of the supplemental agreement between Extension and Big Friday and Hunter Creek was *not in a Conspiracy* with Allen, and this is proved by the testimony of Horning (R. 263):

> "The Extension Company as I understood it in the meantime had issued their prospectus which didn't call for sinking. Mr. Keane's idea was that they might get in bad with the SEC if they now signed that supplemental agreement and agreed to go to the expense of sinking 400 feet, where they hadn't announced in the prospectus they were going to. Mr. Allen felt that since they were doing more work than the prospectus had said they were going to do, that the SEC couldn't have any objection."

It must be inferred from the Record that a great portion of Allen's time was spent in Wallace, Idaho, in connection with his supervising the operations and the construction of the Callahan mill, and not that he deliberately came to Wallace on August 6 and checked out on the 8th, and again on the 27th and checked out on the 30th. Also, it will be noted that Keane did not have an alibi as to his whereabouts on August 28, excepting that Allen was registered at the Samuels Hotel on that date with C. O. Dunlop, president of Hunter Creek (Pltf's Ex. 77).

As to Allen's promoting the Pilot: the consent decree (Pltf's Ex. 121) entered in June, 1943, by Allen, Messrs. D. A. Callahan, W. F. McNaughton and Dr. T. R. Mason, as directors of Lexington Mining Company, because of a technical violation on behalf of the corporation in selling its once SEC registered Callahan shares, this injunction would have expired a mere 12 days after the public offering of Pilot. Therefore, if Allen were the dominant factor in Pilot, wouldn't it be reasonable that he would have waited this 12 days at which time the civil injunction would no longer have any force or effect?

Grismer testified that Allen's central development project for the development of the Alma, Hunter Silver-Lead, Hunter Creek, Idaho Silver, Big Friday, Extension, Pilot and Gold Hunter was the *nucleus* of the whole thing (R. 451). This is borne out by the witnesses, Herrick, Phalen, Johnston, Lakes, Porter and Allen.

All of which is conclusive that there was no criminal intent or conspiracy on the part of Allen to obtain money or property from investors for the purpose of bailing out in Montana, but, on the contrary, it is shown by the Record as a whole, that the object of Allen was for the development of mining properties in which he has successfully been engaged for the last 15 years.

We submit that the defendant could not and did not have a fair trial under an indictment such as the pres-

ent one where the evidence to support such an indictment was a hodge-podge of exhibits, some confessedly forged, many of which did not prove anything in this case but all of which were thrown into the lap of a jury of laymen who could not possibly review them all in a week's time; and on top of this a prolixity of instructions were given which defy the mind of a trained lawyer to apply.

In this particular case it is clear the jury did not believe that Allen had committed any of the acts charged in the first six counts, and the evidence was identical and the same in the seventh count and based upon testimony of the most unreliable kind. It should be borne in mind that Allen was not being tried for embezzlement; that there is no adequate evidence of a conspiracy on his part to violate the various statutes involved in the indictments, other than such evidence as may be found tending to prove the commission of overt acts charged in the first six counts, which the jury has said were not proven. That the jury could not apply the Court's instructions and did not understand them is evident by the questions propounded by the jury when called into court. The jury was entitled to a plain, concise answer to this question.

The defendant had the right to have the jury's question answered in plain and concise language.

We submit that the defendant's right to a fair trial was certainly prejudiced by the Court "assuming"

that some other question was troubling the jury and the court then giving to the jury another voluminous set of instructions accenting the government's cause, and tending only to leave the jury more confused, if anything, than when they asked a simple question of the Court.

For the reasons hereinbefore stated in this Brief, and for the reasons stated in the Brief of Appellant in this case, we urge that the judgment of conviction and commitment of defendant and appellant Allen should be reversed.

Respectfully submitted,

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